

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2073 ✓
77-2078

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IOLA FORTS, PAULA HERBERT, CYNTHIA HALL, LAURA CAREY, LINDA MAROON, CAROL CROOKS, SHARON SILMAN, YVONNE LEE, SHEILA LILES, DEBORAH LEWIS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

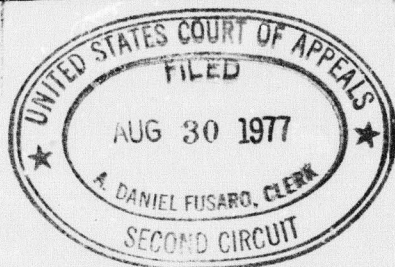
-against-

BENJAMIN WARD, individually and as Commissioner of Correctional Services, FRANCES CLEMENT, individually and as Superintendent, Bedford Hills Correctional Facility, DOROTHY REID, individually and as Deputy Superintendent for Security, Bedford Hills Correctional Facility, MELVIN H. OSTERMAN, JR., Director of Employee Relations for the State of New York, SECURITY UNIT EMPLOYEES COUNCIL 82, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO ("Council 82"), CARL F. GRAY, Executive Director, Council 82, CLAYTON DeFAYETTE, President, Council 82, Local 1265 of Council 82, A.V. YARELL, President, Local 1265,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS-APPELLANTS



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-against-

BENJAMIN WARD, individually and as Commissioner of Correctional Services, FRANCES CLEMENT, individually and as Superintendent, Bedford Hills Correctional Facility, DOROTHY REID, individually and as Deputy Superintendent for Security, Bedford Hills Correctional Facility, MELVIN H. OSTERMAN, JR., Director of Employee Relations for the State of New York, SECURITY UNIT EMPLOYEES COUNCIL 82, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO ("Council 82"), CARL F. GRAY, Executive Director, Council 82, CLAYTON DeFAYETTE, President, Council 82, Local 1265 of Council 82, A.V. YARELL, President, Local 1265,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS-APPELLANTS

Statement of the Case

This is an appeal from an order of the United States District Court for the Southern District of New York (Hon. Richard Owen, D.J.) entered on June 23, 1977 enjoining the defendants Ward, Clement and Reid from assigning male correction officers at the Bedford Hills Correctional Facility to housing units at that institution pending a final determination of the action.

Plaintiffs' application for preliminary injunctive relief came on to be heard before the court on June 9, 1977. Prior to oral argument, the court read the affidavits and briefs submitted by the respective parties. After determining that for the purposes of the preliminary injunction motion there were no issues of fact requiring a hearing and the standards for granting a preliminary injunction were met, the court granted the preliminary injunction from the bench.

Questions Presented

1. Was it an abuse of discretion to grant the preliminary injunction:

a. based upon affidavits evidencing disputed issues of fact without conducting the requested evidentiary hearing?

b. absent a showing of a clear likelihood of success on the law and the facts available, and possible irreparable injury?

c. giving to plaintiffs the ultimate relief they seek?

Statement of Facts

Plaintiffs are women inmates of the Bedford Hills Correctional Facility, the only institution in the State of New York which houses adult women serving sentences pursuant to felony convictions (3a, 7a).

On or about February 1, 1977 in accordance with Department of Correctional Services policy to maximize employment opportunities regardless of sex and to eliminate sex certification for the transfer and assignment of correction officers, male correction officers were assigned to housing units at the Bedford Hills Correctional Facility (8a, 51a).

On or about April 1, 1977, plaintiffs commenced this action alleging deprivation of their right to privacy caused by the posting of male correction officers at various places

in the prison including housing units, shower facilities and the prison clinic in such a manner as to cause the women to be involuntarily exposed to said correction officers (3a, 4a).

Inmates' rooms are lined up on a corridor. Each room has a door with a window. The window has a curtain which can be closed from the inside.

Each room has a toilet. Although, a central switch keeps the doors deadlocked open when the women are on the corridor, the inmates are permitted to have a curtain across the open door for privacy. Inmates may also request that their individual doors be closed while they are attending to personal needs (46a, 47a, 50a).

The shower facilities front on a hallway. Each shower consists of an anteroom and the actual shower stall. The anteroom has a plexiglass door. The stall itself has a curtain. Any inmates wishing to avoid observation by others may turn off the shower, dry herself in the stall, and slip on a robe before stepping into the anteroom (48a).

Absent emergency situations, no male or female correction officer is allowed beyond the waiting room of the prison clinic. The screening clinic and examining rooms are all private (49a).

As a result of the above, it is undisputed that plaintiffs possess the means by which to avoid the alleged deprivations of their right to privacy.

The Opinion Below

Pursuant to Rule 52a of the Federal Rules of Civil Procedure, by memorandum dated June 17, 1977 the court declared its findings of fact and conclusions of law. Accepting the allegations of the four affidavits submitted in support of plaintiffs' application for the preliminary injunction as true, the court held that the plaintiffs established a likelihood of success on the merits. The court also held that the plaintiffs are irreparably injured each time their constitutional right to privacy is invaded.

ARGUMENT

THE COURT ABUSED ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION

- A. It was an abuse of discretion to grant the preliminary injunction based upon pleadings and affidavits evidencing disputed issues of fact without conducting the requested evidentiary hearing.

The allegations of the complaint, the assertions of plaintiffs' affidavits in support of the application for a preliminary injunction and the averments of the defendants' affidavits in opposition thereto are conflicting. The defendants requested the court to conduct an evidentiary hearing to resolve the obvious disputed issues of fact (49a, 63a). Nevertheless, the court granted the relief requested from the bench (115a).

As this Court has repeatedly admonished district court judges passing on motions for preliminary injunctions not to resolve disputed issues of fact on affidavits (Dopp v. Franklin National Bank, 461 F. 2d 873, 879 [2d Cir. 1972]; Cerruti, Inc. v. McCrory Corp., 438 F. 2d 281, 284 [2d Cir. 1971];

Semmes Motors, Inc. v. Ford Motor Company, 429 F. 2d 1197, 1204 [2d Cir. 1970]; Securities & Exchange Commission v. Frank, 388 F. 2d 486 [2d Cir. 1968]; Securities & Exchange Commission v. Petrofunds, Inc., 414 F. Supp. 1191, 1196 [S.D.N.Y. 1976]) the granting of the preliminary injunction under the present circumstances must be reversed.

Plaintiffs, alleging deprivation of their right to privacy caused by the posting of male correction officers at various places in the prison including housing units, shower facilities and the prison clinic in such a manner as to cause the inmates to be involuntarily exposed to said correction officers sought relief enjoining the assignment of male correction officers to the housing units at the Bedford Hills Correctional Facility. The wholly conclusory allegations of the complaint do not demonstrate that any particular plaintiff actually suffered a "specific and perceptible harm" or "concrete injury". Cf. Evans v. Lynn, 537 F. 2d 571, 591 (2d Cir. 1976).

Plaintiffs submitted four (4) affidavits in support of their application for preliminary injunctive relief (16a-24a). As in the complaint, these affidavits contained allegations of

deprivations by unnamed individuals at uncertain times on unspecified dates in unknown places. The truth of such allegations is impossible to ascertain; let alone deny. Who could be duly sworn, depose and say: that an unnamed individual at an uncertain time on an unspecified date in an unknown place did not commit a given act. Moreover it is never alleged that any of the named defendants had knowledge of the acts complained of. However, the defendants did dispute the veracity of plaintiffs' assertions generally.

Disputing the fact that the assignment of male correction officers caused the plaintiffs to be involuntarily exposed to said correction officers, defendants averred that the plaintiff themselves possess the means by which to avoid the alleged deprivations complained of (46a-48a). The court concluded the availability of these remedies was not a satisfactory solution to the impairment of the right to privacy and posed numerous rhetorical questions to support that point. The very fact that these questions existed signals the necessity for the requested evidentiary hearing. Cf. Cerruti, Inc. v. McCrory Corp., supra at 284.

The defendants also averred their unawareness of any grievances filed by plaintiffs pursuant to available inmate grievance procedures with respect to any particular corrections officer and their unawareness of any disciplinary action taken by the Department of Correctional Services against any corrections officers concerning or relating to the alleged deprivation (70a).

Furthermore, an explicit challenge to the credibility of the plaintiffs was raised. The complaint specifically alleges that inmates are not permitted to place a curtain on the doorway when the door is open (10a). The affidavits of the plaintiffs in support of the motion are in direct contravention of their own complaint, since they speak repeatedly of the existence of curtains across the doorway (17a, 18a, 21a). Although the Court was apprised of this inconsistency (47a, 59a), it did not resolve the fact of its existence.

The existence of disputed facts was raised not only by the defendants in opposition to the motion but also by the plaintiffs themselves in support thereof. The court had no basis upon which to accept the allegations of plaintiffs'

four affidavits as true:

"...in such instances, the inappropriateness of proceeding on affidavits attains its maximum. . ." Securities & Exchange Commission v. Frank, supra at 491.

"Such conflicts must be resolved by oral testimony since only by hearing witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations made by the respective parties. If witnesses are not heard the trial court will be left in the position of preferring one piece of paper to another." Sims v. Greene, 161 F. 2d 87, 88 (3d Cir. 1947).

"This is particularly so when the judge [as here] without holding a hearing resolves bitterly disputed facts in favor of the party who has the burden of establishing his right to preliminary relief". Dopp v. Franklin National Bank, supra at 879.

The court labelled four assertions contained in plaintiffs' affidavits as "specific" (115a-116a). Of those allegations, three suffered from the infirmities previously

noted and were denied generally by the defendants. The fourth alleges:

"Finally, I feel very awkward that men are assigned as c.o.'s at the hospital. One time (March 24, 1977), I went to the hospital and was describing to the nurse what my problem which was of a personal, female nature. There was a man guard directly in front of the medication window, where the nurse was. I was very embarrassed to have to describe the problem in front of the man guard." (22a, 116a)

This charge was denied. Defendants' affidavit in opposition averred:

"Plaintiffs also complain of lack of privacy in the medical clinic area and hospital (sick wing). Nurse Administrator Marie E. Daly, as well as the Superintendent, inform me that absent emergency situation, no male or female correction officer is allowed beyond the waiting room of the clinic. The screening clinic, examining rooms, etc., are all private. Although there may be guards in the sick wing area, each woman is in a separate room with a door. That door is usually

closed for examinations; at any time the patient may request that it be closed for privacy reasons". (49a).*

Thus, despite the court's pronouncement that for the purposes of the preliminary injunction motion there were no issue of fact requiring a hearing, the matter before the court did involve disputed issues of fact.

The court's failure to accord to the defendants the requested evidentiary hearing was a gross abuse of discretion. The granting of the preliminary injunction must be reversed.

* Finally the court noted that the affidavits of Yvonne Lee and Linda Marron each name a specific corrections officers and none of the defendants submitted affidavit from these correction officers challenging the truth of the allegations. Assuming arguendo the truth of said allegations, the granting of a preliminary injunction enjoining the assignment of male correction officers at the Bedford Hills Correctional Facility to housing units at that institution, and removing these presently assigned (124a) based upon allegations of only two isolated instances is an abuse of discretion in itself. The scope of the relief afforded and the resulting burden upon the administration of internal security at the Bedford Hills Correctional Facility does not reflect the proof adduced before the district court.

- B. Absent a showing of a clear likelihood of success on the law and facts available and possible irreparable injury the granting of the preliminary injunction was gratuitous

No hearing was held and the district court's decision was based on pleadings and affidavits.

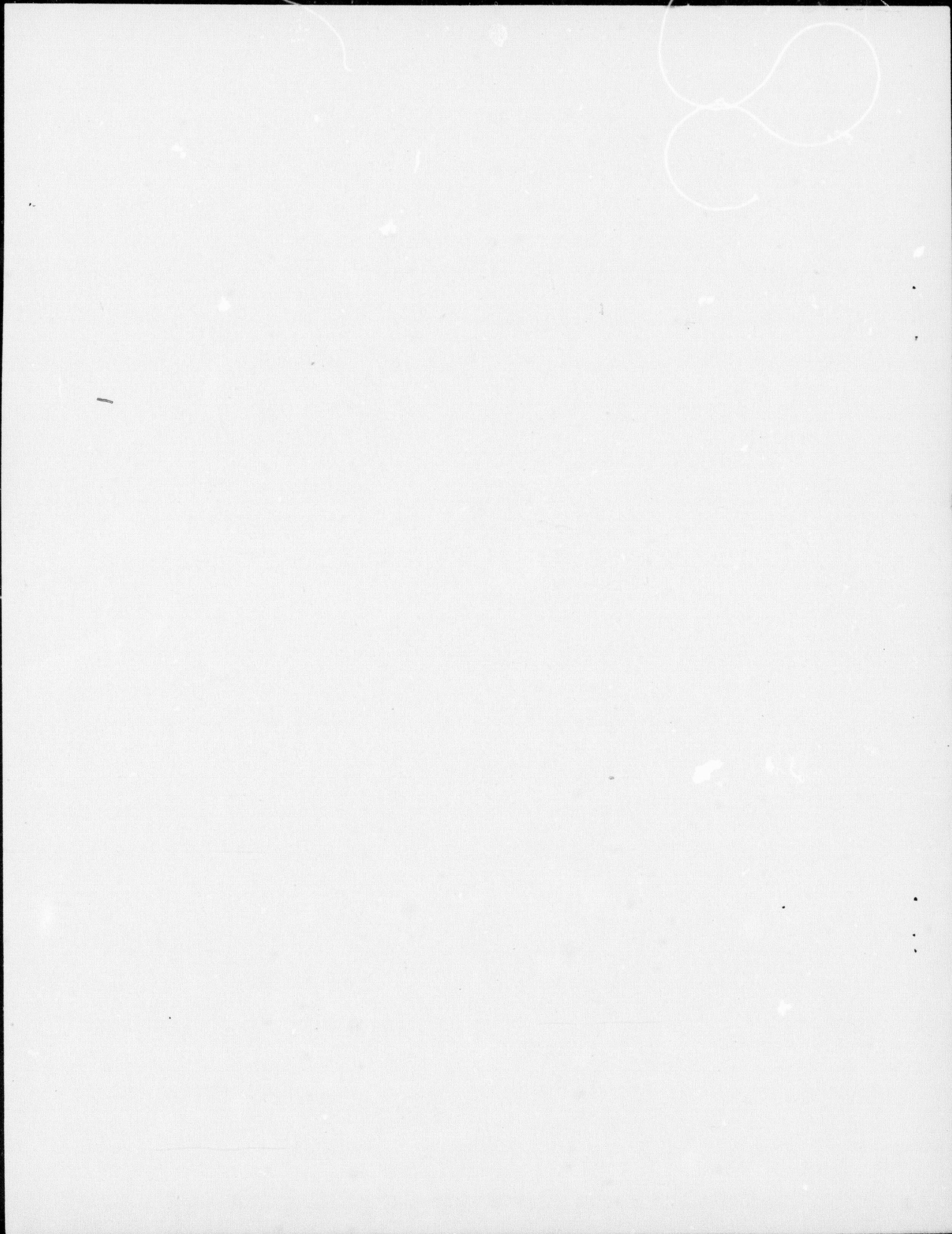
"In such a case this Court is not limited to reviewing the district court's exercise of discretion. Since the court rendered its decision on the pleadings and affidavits before it without a hearing, this Court is in as good a position as the district court to read and interpret those documents. Consequently, this Court is able to exercise its discretion and to review the papers de novo." San Filippo v. United Brotherhood of Carpenters and Joiners of America, 525 F. 2d 508, 511 (2d Cir. 1975).

As pointed out in Argument A, supra, plaintiffs' assertions were disputed by the facts cited in the defendants' affidavits. As a result plaintiffs were precluded from establishing a clear likelihood of success on the law and facts available upon the affidavits submitted in support of the motion.

Since it is undisputed that plaintiffs possess the means by which to avoid the deprivations complained of. The availability of these remedies is a bar to the granting of a preliminary injunction. There is and was no danger here that without the benefit of a preliminary injunction, final relief would be of no avail. This Court has recognized that irreparable injury exists if there is a probable danger that a right may be defeated unless an injunction is issued. San Filippo v. United Brotherhood of Carpenters and Joiners, supra at 502. Plaintiffs cannot establish proof of irreparable injury on the basis of the affidavits before the court. The granting of the preliminary injunction was gratuitous and must be reversed.

- C. It was an abuse of discretion to grant the preliminary injunction giving to plaintiffs the ultimate relief they seek.

The normal function of the preliminary injunction is to maintain the status quo pending a final determination on the merits. Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319, 323 (2d Cir.), cert. den. 394 U.S. 999 (1969); Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738, 742 (2d Cir. 1953). The preliminary injunction granted below gives the plaintiffs substantially the ultimate relief they



seek before there has been any trial of the issues and where the district court's finding that there has been a showing of probable success on the merits is based solely upon affidavits. Thus the granting of the preliminary injunction was an abuse of discretion. Cf. Triebwasser & Katz v. American Telephone & Telegraph Company, 535 F. 2d 1356, 1360 (2d Cir. 1976).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT
GRANTING THE PRELIMINARY INJUNCTION
SHOULD BE REVERSED.

Dated: New York, New York
August 30, 1977

Respectfully submitted,

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Attorney General of the
State of New York
Attorney for Defendants-
Appellants Ward, Clement
and Reid

LEONARD J. PUGATCH
Deputy Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Defendants-Appellants
herein. On the 30th day of August , 197⁷, she
served the annexed/upon the following named persons :
2 copies

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Attorney s in the within entitled action by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
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New York, New York 10047, directed to said Attorney^s at the
address^{es} within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
30th day of August , 197⁷

Assistant Attorney General
of the State of New York